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## Check Yes for Checkpoints: Suspicionless Stops and Ramifications for Missouri Motorists

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## NOTE

# Check Yes for Checkpoints: Suspicionless Stops and Ramifications for Missouri Motorists

*State v. Biggerstaff*, 496 S.W.3d 513 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016)

Conner Harris\*

### I. INTRODUCTION

One of the great advantages of living in a free society is the enjoyment of general privacy and freedom from unwarranted interference in one's personal affairs. This advantage benefits citizens in both their private and public interactions. For example, it is expected one could drive to the store across town, the mall in a neighboring city, or somewhere on the other side of the country uninterrupted and unhindered. The primary exception to this privacy expectation is that engaging in conduct that violates the law can warrant a stop and seizure by law enforcement.<sup>1</sup>

The Fourth Amendment to the United States Constitution codifies this privacy expectation as a right to be enjoyed by all within its reach.<sup>2</sup> Specifically, the Fourth Amendment protects against "unreasonable searches and seizures."<sup>3</sup> Drawing the line between reasonable and unreasonable is a task with which courts often wrestle. This line has a direct impact on how police officers perform searches and seizures and how the subjects of those searches and seizures are treated in the criminal justice system.

A general component of Fourth Amendment reasonableness is an individualized suspicion of wrongdoing.<sup>4</sup> However, police checkpoints – designated locations which require passing vehicles to stop and submit to a police

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1. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1613 (2012).

2. U.S. CONST. amend. IV.

3. U.S. CONST. amend. IV.

4. Jason Fiebig, Comment, *Police Checkpoints: Lack of Guidance from the Supreme Court Contributes to Disregard of Civil Liberties in the District of Columbia*, 100 J. CRIM. L. & CRIMINOLOGY 599, 606 (2010).

officer's questioning – have been upheld as constitutional in both federal and state courts as a permissible method of instigating a seizure without individualized suspicion.<sup>5</sup> Checkpoint jurisprudence at the federal level has not yet resulted in concrete requirements for reasonableness, but there are general underlying principles.<sup>6</sup> Missouri courts have likewise abstained from providing any sort of checklist before a checkpoint may be considered reasonable<sup>7</sup> but instead seem to judge each checkpoint on a case-by-case basis, often yielding inconsistent results.<sup>8</sup> A recent decision by the Missouri Court of Appeals, Southern District, *State v. Biggerstaff*, indicates that checkpoints designed to enforce vehicle equipment laws, also known as enforcement checkpoints, may be set up at any location, at a moment's notice, and for an indefinite duration.<sup>9</sup>

This Note explores and discusses the repercussions of this decision. Part II of this Note explores the facts of *State v. Biggerstaff* in detail. Part III analyzes the constitutionality of police checkpoints under federal law and in the state of Missouri. Part IV examines the reasoning and holding of the Southern District of Missouri in *State v. Biggerstaff*. Finally, Part V comments on the Southern District of Missouri's rationale in reaching its holding, as well as how this decision will apply to motorists in the future.

## II. FACTS AND HOLDING

Stacy Biggerstaff was stopped on April 17, 2013, in the early afternoon at an equipment enforcement checkpoint in Taney County, Missouri.<sup>10</sup> The checkpoint's purpose "was to enforce traffic safety laws, with a focus on driver qualification and the condition of the motor vehicles' safety equipment."<sup>11</sup> Evidence obtained during the stop resulted in Biggerstaff being charged with possession of a controlled substance, driving while intoxicated, and driving with a suspended license.<sup>12</sup> Prior to trial, Biggerstaff motioned to suppress evidence resulting from the traffic stop on the grounds that the checkpoint violated state and federal constitutional prohibitions against unreasonable searches and seizures.<sup>13</sup>

Two relevant documents were admitted into evidence: General Order 64-02, which was promulgated by the Missouri Highway Patrol, and Special Order 24, which was issued by and applicable only to Troop D, the branch of the

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5. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

6. *See Fiebig*, *supra* note 4, at 605–12.

7. *State v. Biggerstaff*, 496 S.W.3d 513, 514 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016).

8. *Id.*

9. *Id.* at 515.

10. *Id.* at 513.

11. *Id.* at 515.

12. *Id.* at 513.

13. *Id.* at 514.

Missouri Highway Patrol with jurisdiction over Taney County.<sup>14</sup> Both orders laid out general guidelines for conducting checkpoints.<sup>15</sup> The special order included a list of approved locations for checkpoints during daylight hours.<sup>16</sup> The locations were “selected by zone supervisors for the purpose of reducing property damage, injuries, and deaths caused by unqualified drivers and defective equipment on motor vehicles.”<sup>17</sup> Deciding checkpoint location was a matter of convenience, “the actual choice [of checkpoint location] would then be made based upon where the troopers to be used to man the checkpoint were working at that time.”<sup>18</sup>

The checkpoint itself consisted of two police cars, both with their emergency lights activated.<sup>19</sup> The officers on site stood in the roadway wearing police uniforms and reflective vests.<sup>20</sup> Additionally, “[e]very vehicle that approached the checkpoint was stopped.”<sup>21</sup> The stops took as little as thirty seconds and consisted of a routine driver’s license check plus an officer checking the functionality of one piece of vehicle safety equipment, such as a turn signal.<sup>22</sup> Biggerstaff did not have a driver’s license when she was stopped at the checkpoint and was directed to pull over so the officer could further investigate.<sup>23</sup> It was during this investigation that the officer determined that Biggerstaff was intoxicated.<sup>24</sup> She was subsequently arrested and charged.<sup>25</sup> Biggerstaff motioned to suppress evidence obtained from this checkpoint on the grounds that it was unconstitutional.<sup>26</sup>

Biggerstaff argued three primary issues at trial: (1) the location of the checkpoint was not determined using specific data; (2) the checkpoint was conducted without written procedures; and (3) there were no signs, signal flares, or otherwise sufficient forms of notice to warn approaching traffic of the checkpoint.<sup>27</sup> The court found that two of Biggerstaff’s three main contentions – a lack of written instruction and sufficient notice – were directly refuted by the evidence in the case.<sup>28</sup> The court further noted that it was not a requirement for a checkpoint’s location to be selected based on specific data indicating

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14. Record on Appeal – Transcript at 7–8, *Biggerstaff*, 496 S.W.3d 513 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016) (No. SD 34001).

15. *Id.*

16. *See Biggerstaff*, 496 S.W.3d at 515.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 515–16.

25. *Id.* at 516.

26. *Id.* at 514.

27. *Id.*

28. *Id.* at 516.

heightened probabilities of criminal violations.<sup>29</sup> Location was merely one factor to consider in a balancing test.<sup>30</sup> The trial court found that the checkpoint was not unreasonable and denied Biggerstaff's motion to suppress evidence.<sup>31</sup> Upon her subsequent conviction, Biggerstaff appealed this denial to the Missouri Court of Appeals, Southern District. The Southern District of Missouri affirmed the trial court and held that the checkpoint was not unconstitutional because Biggerstaff failed to show that the checkpoint was unreasonable.<sup>32</sup>

### III. LEGAL BACKGROUND

#### A. *Individualized Suspicion and Reasonableness*

The Fourth Amendment to the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>33</sup> The analogous section of the Missouri Constitution states, "[T]he people shall be secure in their persons, papers, homes, effects, and electronic communications and data, from unreasonable searches and seizures."<sup>34</sup> The prohibition against only "unreasonable" searches and seizures indicates that reasonable searches and seizures are acceptable.<sup>35</sup> The reasonableness of a law enforcement action "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."<sup>36</sup>

The Fourth Amendment's demand for reasonableness relies heavily on an individualized suspicion of wrongdoing.<sup>37</sup> Individualized suspicion is "the idea that the state should judge each citizen based upon his own unique actions, character, thoughts, and situation," and not "on stereotypes, assumptions, guilt-by-association, or other generalities."<sup>38</sup> Individualized suspicion is the "beating heart" that keeps people secure in their person and property and deters unreasonable government intrusion.<sup>39</sup> Its purpose is to limit the amount of discretion a law enforcement officer may use.<sup>40</sup> For example, in *Delaware v. Prouse*, the Court held that roving traffic stops cannot occur without at least reasonable suspicion that the driver is violating the law or is subject to a lawful

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29. *Id.*

30. *Id.*

31. *Id.* at 514.

32. *Id.* at 516.

33. U.S. CONST. amend. IV.

34. MO. CONST. art. I, § 15.

35. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

36. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

37. *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

38. Andrew E. Taslitz, *What is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 L. & CONTEMP. PROBS. 145, 146 (2010).

39. *See id.* at 145.

40. *See Edmond*, 531 U.S. at 39.

seizure.<sup>41</sup> This was in part because traveling in automobiles is an everyday occurrence for many Americans, and their expectation of privacy necessarily follows them to their automobile in order to preserve the integrity of the Fourth Amendment.<sup>42</sup>

Police stops are considered seizures for constitutional purposes.<sup>43</sup> Generally speaking, searches and seizures conducted without individualized suspicion of wrongdoing are unreasonable.<sup>44</sup> However, under very limited conditions, suspicionless stops are considered reasonable.<sup>45</sup> Fixed police checkpoints have been upheld in both federal and state courts as a reasonable method of instigating a seizure without individualized suspicion.<sup>46</sup>

### B. Supreme Court Rulings on Checkpoints

The Supreme Court of the United States has upheld checkpoints with specific primary purposes, such as intercepting illegal aliens at international borders<sup>47</sup> and locating intoxicated drivers and removing them from the road.<sup>48</sup> In *United States v. Martinez-Fuerte*, the Supreme Court upheld a checkpoint located near the United States's southern border because, despite fairly intrusive stops requiring passengers to present certain documents and answer personal questions, the United States government had an incredibly strong interest in securing its border.<sup>49</sup> In *Michigan Department of State Police v. Sitz*, the Supreme Court upheld a checkpoint designed to stop drunk driving because the intrusion was relatively small – the average delay was twenty-five seconds<sup>50</sup> – compared to the State's interest in keeping drunk drivers off the road.<sup>51</sup>

However, even these reasonable checkpoints must meet minimum criteria to pass muster.<sup>52</sup> A constitutional checkpoint bars an officer from exercising “standardless and unconstrained discretion.”<sup>53</sup> In general, the primary purpose of the checkpoint must be “closely related to the problems of policing the border or the necessity of ensuring roadway safety.”<sup>54</sup>

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41. See *Prouse*, 440 U.S. at 663.

42. *Id.* at 662–63.

43. See *id.* at 653.

44. See *Edmond*, 531 U.S. at 37.

45. *Id.*

46. *Id.* at 40.

47. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976).

48. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

49. *Martinez-Fuerte*, 428 U.S. at 556.

50. *Sitz*, 496 U.S. at 448.

51. *Id.* at 455.

52. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–43 (2000).

53. *Id.* at 39 (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)).

54. *Id.* at 41. *But see* *Illinois v. Lidster*, 540 U.S. 419, 421 (2004) (upholding a checkpoint stop when the purpose was to gather information from motorists and not to identify unlawful conduct).

The Supreme Court case *City of Indianapolis v. Edmond* involved a checkpoint designated to intercept illegal drugs.<sup>55</sup> The checkpoint was operated by approximately thirty officers pursuant to formal instructions issued by the chief of police.<sup>56</sup> When a motorist stopped at the checkpoint, a drug dog walked around the vehicle and sniffed for illegal narcotics.<sup>57</sup> The checkpoint's location was selected in advance based on crime statistics and traffic flow data.<sup>58</sup> Signs were also posted to notify motorists of the checkpoint's location.<sup>59</sup>

The Court took no issue with how the checkpoint was conducted.<sup>60</sup> Instead, it held that the checkpoint violated the Fourth Amendment because its primary purpose was to “uncover evidence of ordinary criminal wrongdoing.”<sup>61</sup> According to the Court, confiscating drugs did not immediately serve the purpose of securing the border or preserving roadway safety.<sup>62</sup> The government argued that all checkpoints ultimately share the goal of arresting suspected criminals.<sup>63</sup> The Court warned that permitting a checkpoint with such a broadly stated purpose would allow checkpoints to be set up at the whim of law enforcement.<sup>64</sup> Regulating the purpose of suspicionless intrusions is relevant because it deters abusive police conduct.<sup>65</sup> To combat situations where police administer checkpoints with impermissible purposes under the guise of lawful stated purposes, the Court must consider all available evidence to determine the primary purpose of the checkpoint.<sup>66</sup> Without this judicial safeguard, suspicionless stops would occur with undue regularity, and a primary purpose of the Fourth Amendment would be rendered moot.<sup>67</sup>

### C. Checkpoint Law in Missouri

In Missouri, the law on checkpoints is largely the same as federal law.<sup>68</sup> The provision contained in the Missouri Constitution that protects against unreasonable searches and seizures is “interpreted to provide essentially the same

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55. *Edmond*, 531 U.S. at 34.

56. *Id.* at 35.

57. *Id.*

58. *Id.*

59. *Id.* at 35–36.

60. *Id.* at 40.

61. *Id.* at 41–42.

62. *Id.* at 42.

63. *Id.*

64. *Id.*

65. *Id.* at 47.

66. *Id.* at 46–47.

67. *Id.* at 42.

68. *See State v. Welch*, 755 S.W.2d 624, 626–27, 631 (Mo. Ct. App. 1988).

protection found in the [F]ourth [A]mendment to the United States Constitution.”<sup>69</sup> Missouri courts share the Supreme Court’s conclusions regarding the constitutionality of checkpoints.<sup>70</sup> Two Missouri cases are frequently cited when Missouri checkpoints are at issue.<sup>71</sup> One, *State v. Welch*, is an example of how to design a reasonable, court-approved checkpoint.<sup>72</sup> The other, *State v. Canton*, is an adept illustration of precisely how not to conduct a checkpoint.<sup>73</sup>

*State v. Welch* involved a sobriety checkpoint that was designed according to a prepared plan and operated by supervisory personnel belonging to Troop F of the Missouri Highway Patrol.<sup>74</sup> Previously collected data indicated the checkpoint’s location was an area where frequent alcohol-related accidents occurred.<sup>75</sup> A command officer of Troop F personally issued the order to conduct the checkpoint, which included “specific guidelines, locations, and times to be followed by field personnel.”<sup>76</sup> All personnel assigned to work the checkpoint met prior to its commencement to discuss their duties and received printouts of the commanding officer’s order to consult.<sup>77</sup> This order also set protocols for various situations that may arise during the checkpoint, such as if traffic slowed to the point of unreasonably delaying travelers.<sup>78</sup>

Furthermore, a sign reading “Sobriety Checkpoint Ahead” was posted to notify oncoming traffic of the checkpoint, and signal flares were placed along the roadside to guide approaching vehicles.<sup>79</sup> Police cars were positioned around the area of the checkpoint with their emergency lights activated, and officers wearing reflective vests directed traffic with flashlights.<sup>80</sup> All of these factors contributed to the court’s finding that the checkpoint was constitutional.<sup>81</sup>

On the other hand, the court found that the checkpoint in *State v. Canton* was unreasonable because it lacked nearly every factor of reasonableness found in *Welch*.<sup>82</sup> The checkpoint in *Canton* was designated to check for vehicle defects, the validity of the operator’s license, and intoxicated drivers.<sup>83</sup> It lacked any prior notice and consisted of only two patrol cars with flashing

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69. *Id.* at 631 (quoting *State v. Sweeney*, 701 S.W.2d 420, 425 (Mo. 1985) (en banc)).

70. *Id.*

71. *Id.* at 624; *State v. Canton*, 775 S.W.2d 352 (Mo. Ct. App. 1989).

72. *Welch*, 755 S.W.2d at 625–26.

73. *Canton*, 775 S.W.2d at 352–53.

74. *Welch*, 755 S.W.2d at 625.

75. *Id.*

76. *Id.* at 632.

77. *Id.*

78. *Id.* at 632–33.

79. *Id.* at 631.

80. *Id.* at 625.

81. *Id.* at 633.

82. *State v. Canton*, 775 S.W.2d 352, 353–54 (Mo. Ct. App. 1989).

83. *Id.* at 353.



emergency lights and two officers with flashlights.<sup>84</sup> The number of officers was problematic because the checkpoint had to cease its operation whenever a violation was suspected.<sup>85</sup> The checkpoint's location was decided by "the originating officer on some non-defined general awareness that some arrests had occurred in the area" and not by specific data.<sup>86</sup> The officers involved were not adequately trained nor were there established guidelines for conducting the checkpoint.<sup>87</sup> Under the circumstances, "[a] driver approaching the scene would have no idea what was occurring, what his response should be, or why he was being stopped."<sup>88</sup>

*Welch* and *Canton* leave us with two extreme examples of checkpoints but not a lot of middle ground. Ultimately, the validity of a checkpoint "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."<sup>89</sup> Balancing tests require that certain factors be considered in determining reasonableness – not that certain elements be satisfied.<sup>90</sup> Not all of the factors considered in *Welch* need to be present for a checkpoint to be considered valid.<sup>91</sup>

Another Supreme Court of Missouri case, *State v. Damask*, reiterated the importance of proper notice and a logical location.<sup>92</sup> The *Damask* checkpoint featured large illuminated signs that warned of an approaching checkpoint.<sup>93</sup> The court stated that notice reduces the intrusion of the stop to the motorist on a subjective level by alleviating potential concern or surprise.<sup>94</sup> Hence, "there should be some prior notice of the existence of the checkpoint."<sup>95</sup>

The actual location of the checkpoint in *Damask* was situated at a traffic-controlled intersection at the end of an exit ramp.<sup>96</sup> The signs were purposely ambiguous so that motorists might think that the checkpoint was straight ahead on the interstate, past the exit ramp.<sup>97</sup> The exit led to few advertised roadway services, making it more likely that those who did exit were attempting to avoid the perceived checkpoint on the interstate, only to find themselves stopped at a checkpoint on the exit ramp.<sup>98</sup> The court approved of this location because

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84. *Id.*

85. *Id.* at 354.

86. *Id.* at 353.

87. *Id.* at 354.

88. *Id.*

89. *State v. Welch*, 755 S.W.2d 624, 626 (Mo. Ct. App. 1988) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

90. *Id.*

91. *Id.* at 633.

92. *State v. Damask*, 936 S.W.2d 565, 575 (Mo. 1996) (en banc).

93. *Id.*

94. *Id.* at 574.

95. *Id.*

96. *Id.* at 575.

97. *Id.* at 568.

98. *Id.*

it considered a controlled intersection to be a relatively safe place to stop vehicles and because the location specifically targeted drug couriers expected to prematurely exit from their route to avoid law enforcement.<sup>99</sup> After considering these factors, the court upheld the checkpoint because “[t]he checkpoint plan and operation virtually eliminated the officers’ discretion in stopping vehicles.”<sup>100</sup>

#### IV. INSTANT DECISION

In *Biggerstaff*, the Missouri Court of Appeals, Southern District, determined that the checkpoint at issue was constitutional after balancing the relevant interests.<sup>101</sup> Essentially, the *Biggerstaff* checkpoint had enough factors to tip the scale of the balancing test toward reasonableness, despite not possessing all of the *Welch* factors.<sup>102</sup>

*Biggerstaff* argued that the checkpoint was unreasonable for three reasons.<sup>103</sup> First, unlike in *Welch*, the checkpoint did not provide sufficient notice to motorists.<sup>104</sup> *Welch* was held constitutional in part because of the notice provided to motorists.<sup>105</sup> In *Welch*, a sign reading “Sobriety Checkpoint Ahead” was displayed alongside the road before motorists encountered the checkpoint and illuminated signal flares were placed at the checkpoint’s location, where officers with reflective vests and flashlights guided traffic.<sup>106</sup> *Biggerstaff* argued that the notice was insufficient because it was less apparent than in *Welch*.<sup>107</sup>

While not expressly commenting on the specific issue of notice, the court adopted the position of the trial court by stating that the evidence available “refutes Defendant’s claims that no . . . signs or other warnings were given to drivers about the checkpoint.”<sup>108</sup> The two police cars parked on the side of the road with their emergency lights activated provided enough notice to satisfy the court.<sup>109</sup>

Second, *Biggerstaff* argued that “no written procedures were implemented and provided to field personnel.”<sup>110</sup> The court rejected this argument outright, pointing to the State’s Exhibit 8 in evidence, which included both

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99. *Id.* at 575.

100. *Id.*

101. *State v. Biggerstaff*, 496 S.W.3d 513, 516 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016).

102. *Id.* at 515.

103. *Id.* at 514.

104. *Id.*

105. *State v. Welch*, 755 S.W.2d 624, 633 (Mo. Ct. App. 1988).

106. *Id.* at 625.

107. *Biggerstaff*, 496 S.W.3d at 514.

108. *Id.* at 516 (internal quotation marks omitted).

109. *Id.* at 515.

110. *Id.* at 514.

Special Order 24 and General Order 64-02, two documents that provided general guidelines for conducting checkpoints.<sup>111</sup>

The court did not analyze the caliber of instruction provided by the Special Order or General Order, and the court seemed satisfied that any level of instruction guided the effectuation of the checkpoint.<sup>112</sup> The court noted that prior to conducting the checkpoint, the officers involved “met together briefly . . . and they went over how [the checkpoint] was to be conducted.”<sup>113</sup>

Third, Biggerstaff argued that the checkpoint was unreasonable because its location was not chosen based on specific data indicating high rates of illegal activity or accidents.<sup>114</sup> The court recognized that this was true but found a caveat in Special Order 24 that contained a list of approved checkpoint locations.<sup>115</sup> These locations were approved by a Zone Supervisor in the Troop at the recommendation of other officers.<sup>116</sup> While it was not based on scientifically-gathered data, the pre-approved list of locations weighed in favor of reasonableness.<sup>117</sup>

Regardless of how the checkpoint location was decided, the court expressly declared that specific data was not required when choosing the location for a checkpoint because “*Welch* does not *require* such evidence, and the checkpoint in *Canton* was not found to be constitutionally deficient *solely* because of the lack of [specific data].”<sup>118</sup> Ultimately, the court’s decision to uphold the checkpoint rested on its assertion that Biggerstaff did not adequately demonstrate that law enforcement officers had unbridled discretion in conducting this checkpoint.<sup>119</sup>

## V. COMMENT

*Biggerstaff* departed from precedent in several ways. First, it moved the fulcrum of the balancing test so that the state’s interests prevailed. Second, the notice factor was gutted and rendered practically meaningless. Third, the court was very deferential to the police orders that authorized the checkpoint. This deference significantly diminished the importance of logically selecting a checkpoint’s location. Fourth, *Biggerstaff* upheld a checkpoint with a generally stated purpose. Finally, the *Biggerstaff* checkpoint permitted unbridled police discretion in almost every facet of its operation.

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111. *Id.* at 515.

112. *Id.*

113. *Id.*

114. *Id.* at 514.

115. *Id.* at 515.

116. *Id.*

117. *Id.*

118. *Id.* at 516.

119. *Id.*

A. *A Balancing Test: State Interest vs. Fourth Amendment Intrusion*

A law enforcement officer's search or seizure of an individual is only lawful if it is reasonable.<sup>120</sup> A reasonable search or seizure occurs when the state's interests outweigh the individual's Fourth Amendment interests.<sup>121</sup> In *Michigan Department of State Police v. Sitz*, the Supreme Court of the United States permitted suspicionless seizures at checkpoints designed to target drunk drivers.<sup>122</sup> However, the Court has since limited the extent of that power by holding that checkpoints designed merely to detect general criminal wrongdoing are unconstitutional.<sup>123</sup> In *City of Indianapolis v. Edmond*, the Court identified specific circumstances under which suspicionless seizures would be acceptable, stating “[o]nly with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.”<sup>124</sup>

The state's interest in stopping drunk driving is strong due to the enormous danger drunk drivers bring to the roadways.<sup>125</sup> The Court used illustrative language to describe exactly what conduct the state is most compelled to stop, even at the temporary expense of individual privacy interests.<sup>126</sup> A definition of “immediate, vehicle-bound threat to life and limb” is not provided by the Court, but the plain meaning indicates that the Court is addressing only issues of roadway safety that impose a present and substantial risk of serious bodily harm.<sup>127</sup> A threat such as drunk driving qualifies as such a risk because alcohol significantly impairs one's cognitive and motor functions, which makes operating a motor vehicle under the influence of alcohol an extraordinarily dangerous task.<sup>128</sup>

The state's interest was significantly weaker in *Biggerstaff* where the purpose of the checkpoint was merely to check the equipment of a motorist's vehicle to ensure its functionality.<sup>129</sup> While it is undeniable that a vehicle is safer if all of its signaling equipment is working properly, a defective turn signal does not capture the urgency of the “immediate, vehicle-bound threat to life and limb” with which the *Edmond* Court was so concerned.<sup>130</sup> In fact, trial court testimony from an officer on the scene indicated that there was no reason for a turn signal to be activated at the location of the checkpoint because it was

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120. *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979).

121. *Id.* at 654.

122. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

123. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000).

124. *Id.* at 43 (emphasis added).

125. *Sitz*, 496 U.S. at 451.

126. *Id.*

127. *Edmond*, 531 U.S. at 43.

128. *Alcohol and Driving*, ALCOHOL & DRUG FOUND., <http://adf.org.au/insights/alcohol-and-driving/> (last visited Sept. 26, 2017).

129. Record on Appeal – Transcript, *supra* note 14, at 6.

130. *Edmond*, 531 U.S. at 43.

a straight stretch of road.<sup>131</sup> A defective turn signal in that circumstance certainly does not meet the temporal element of “immediacy,” let alone the label of “vehicle-bound threat to life and limb.”<sup>132</sup>

Furthermore, the state’s interest in maintaining roadway safety through properly functioning safety equipment is already served to a certain degree because Missouri requires all vehicles registered in the state to submit to regular vehicle inspections.<sup>133</sup> In *Prouse*, the Supreme Court used a similar rationale when it held that roving suspicionless stops were unconstitutional.<sup>134</sup> The Court further stated that even out-of-state vehicles need not arouse suspicion or be stopped because the states in which they are registered likely have similar minimum safety requirements as the required vehicle inspection.<sup>135</sup> The *Prouse* court was adamant that “[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure.”<sup>136</sup>

*Prouse* is distinguishable from checkpoint cases because it involved roving suspicionless traffic stops – seizures enacted by actively patrolling officers.<sup>137</sup> Checkpoints are static,<sup>138</sup> however, the *Prouse* decision requires a powerful justification to stop drivers without suspicion.<sup>139</sup> *Prouse* maintains that even if discretion is eliminated by stopping “every occupant of every vehicle,” the state’s interests do not outweigh any individual’s Fourth Amendment rights.<sup>140</sup> Essentially, even the complete elimination of police discretion does not alone make a stop constitutional.<sup>141</sup> This rationale applies to the *Biggerstaff* checkpoint because every driver who passed that checkpoint was stopped.<sup>142</sup>

The *Prouse* Court’s observation that these stops only provide a “marginal contribution to roadway safety”<sup>143</sup> places them far below the *Edmond* Court’s “immediate, vehicle-bound threat to life and limb” standard.<sup>144</sup> These stops also do not meet the requirements of the *Welch* court, which provided “essentially the same” protection as the Fourth Amendment.<sup>145</sup> *Biggerstaff* departed from precedent by relaxing the standard for suspicionless stops and finding that

131. Record on Appeal – Transcript, *supra* note 14, at 39.

132. See *Edmond*, 531 U.S. at 43.

133. MO. REV. STAT. § 307.350 (2016).

134. *Delaware v. Prouse*, 440 U.S. 648, 660–61 (1979).

135. *Id.* at 661.

136. *Id.* (emphasis added).

137. See *id.* at 656–58.

138. *Id.* at 663.

139. *Id.*

140. *Id.* at 661.

141. *Id.*

142. *State v. Biggerstaff*, 496 S.W.3d 513, 515 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016).

143. *Prouse*, 440 U.S. at 661.

144. *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000).

145. *State v. Welch*, 755 S.W.2d 624, 631 (Mo. Ct. App. 1988) (quoting *State v. Sweeney*, 701 S.W.2d 420, 425 (Mo. 1985) (en banc)).

the state's interest in conducting equipment enforcement checkpoints outweighed an individual's privacy expectation.

### B. *The Notice Factor*

A number of factors are considered when a court determines the constitutionality of a checkpoint.<sup>146</sup> These factors include: whether or not there was a specific plan of action in conducting the checkpoint; how closely that plan was followed; the amount of prior notice given to motorists; the reason for the location of the checkpoint; and the general room for the exercise of officer discretion.<sup>147</sup> *Biggerstaff* upheld the constitutionality of the checkpoint at issue despite the weight of these factors – most notably notice and checkpoint location – being significantly less than in *Welch*.<sup>148</sup>

*Biggerstaff*'s comment on notice creates a major concern pertaining to the constitutionality of checkpoints. That concern is the subjective intrusion imposed on motorists.<sup>149</sup> Subjective intrusion is defined as “the amount of discretion available to the officers in operating the checkpoint and the extent to which a stop may generate concern or fright on the part of lawful travelers.”<sup>150</sup> A motorist's expectation of privacy includes an expectation of freedom from arbitrary invasions including subjective intrusions.<sup>151</sup> Prior notice would alleviate the issue of concern or fright by providing a motorist with a prior explanation for the stop and lessen the degree of subjective intrusion.<sup>152</sup>

The *Biggerstaff* court held that the presence of police officers and police vehicles with activated emergency lights sufficed as notice,<sup>153</sup> despite the *Canton* court's concern that drivers should be able to reasonably discern that they are entering a checkpoint.<sup>154</sup> The mere presence of police officers and their vehicles on the side of the road may look substantially similar to any investigatory stop or law enforcement practice. Without more to indicate that a checkpoint is in effect – such as signs, illuminated flares, or notice published in the local paper – motorists may question why they are being directed to pull over.<sup>155</sup> The Supreme Court of Missouri has advocated for proper notice for checkpoints as a means to lessen the degree to which checkpoints “generate concern or fright.”<sup>156</sup> In *State v. Damask*, the court drew an unambiguous conclusion regarding notice, noting that “there should be *some prior notice* of the

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146. *Id.* at 632–33.

147. *Id.*

148. *State v. Biggerstaff*, 496 S.W.3d 513, 516 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016).

149. *State v. Damask*, 936 S.W.2d 565, 573–74 (Mo. 1996) (en banc).

150. *Id.* at 573.

151. *Id.* at 571.

152. *Id.* at 574.

153. *Biggerstaff*, 496 S.W.3d at 515–16.

154. *State v. Canton*, 775 S.W.2d 352, 354 (Mo. Ct. App. 1989).

155. *Id.*

156. *Damask*, 936 S.W.2d at 574.

existence of the checkpoint.”<sup>157</sup> *Damask* transformed notice from a factor into a requirement.

*Biggerstaff*'s rationale regarding notice is tautological; if mere visibility of police cars and officers provides sufficient notice, then notice is almost always sufficient. Unless the cars are completely hidden from view, they will always be visible as drivers approach them, and a court following *Biggerstaff* could conclude that motorists were adequately alerted to the existence and nature of the checkpoint. There must be something more to the notice requirement that *Damask* alluded to than the bare minimum standard *Biggerstaff* provides; otherwise, there is little value in considering notice in a reasonableness analysis.

### C. The Need for a Plan

The use of a designed plan for conducting checkpoints is also frequently cited as a factor for courts to consider.<sup>158</sup> In *Biggerstaff*, the court deferred heavily to the police special orders and did not question whether the six pages of checkpoint locations were logical.<sup>159</sup> These locations were approved by superior officers at the suggestions of lower ranked officers,<sup>160</sup> but the court did not question the methodology of selecting locations.<sup>161</sup> This suggests that officers may approve any location with the understanding that the court will not step in.

Testimony from an officer who worked the checkpoint at issue indicated that in practice, the checkpoint's location depends upon where officers are located at the time.<sup>162</sup> When and where a checkpoint will be is decided approximately one hour before vehicles are first stopped at the checkpoint.<sup>163</sup> The court had no issue with this timeframe but gave no guidance as to whether a time lapse was necessary or if checkpoints could be set up spontaneously.<sup>164</sup> The court again showed deference to the discretion of law enforcement on a matter where discretion is explicitly intended to be minimized.<sup>165</sup>

In fact, the court went a step beyond deferring to the special order. It completely waived the location factor from its consideration.<sup>166</sup> Prior to *Biggerstaff*, checkpoint jurisprudence in Missouri either indicated that a location should be selected because collected data indicated heightened rates of traffic

157. *Id.* (emphasis added).

158. *See id.* at 574; *Canton*, 775 S.W.2d at 354; *State v. Welch*, 755 S.W.2d 624, 633 (Mo. Ct. App. 1988).

159. *State v. Biggerstaff*, 496 S.W.3d 513, 515–16 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016).

160. Record on Appeal – Transcript, *supra* note 14, at 11.

161. *See Biggerstaff*, 496 S.W.3d at 515–16.

162. Record on Appeal – Transcript, *supra* note 14, at 30.

163. *Id.* at 28–29.

164. *See Biggerstaff*, 496 S.W.3d at 515–16.

165. *See id.*

166. *See id.*

violations in the area<sup>167</sup> or because the layout of the checkpoint prioritized safety and would primarily target criminals.<sup>168</sup> The location of the *Canton* checkpoint was not logically selected and was held unconstitutional.<sup>169</sup> The creators of the *Biggerstaff* checkpoint did not rely on specific data when deciding on a location, and the court did not comment on whether the location was otherwise acceptable.<sup>170</sup> The court acknowledged that location is one factor to be considered, but *how* the location is determined is not discussed in the court's opinion.<sup>171</sup> As indicated above, the *Biggerstaff* court stated, "*Canton* was not found to be constitutionally deficient *solely* because of the lack of [specific data]."<sup>172</sup> Under *Biggerstaff*, a checkpoint can still be constitutional even if the location is not logically selected. The abrogation of the location factor's significance, along with the court's treatment of the notice factor, allows for a checkpoint that is quite different from the gold standard set forth in *Welch*.<sup>173</sup>

#### D. General vs. Specific Purpose

Checkpoint standards are ultimately derived from the fundamental components of the Fourth Amendment and the general prohibition against suspicionless stops.<sup>174</sup> Checkpoints provide a narrow exception to this prohibition, and the Supreme Court reminds us that it is indeed narrow:

If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.<sup>175</sup>

Essentially, the less specific a checkpoint's purpose, the less likely it is that it will be upheld as constitutional. *Biggerstaff* does not conform to this rule. First, the equipment enforcement checkpoint in *Biggerstaff* had a purpose that appeared to be serving the general interest of crime control and not the specific Supreme Court-approved purposes of policing the border or ensuring roadway safety.<sup>176</sup> Its primary purpose was to "reduce property damage, injuries, and

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167. See *State v. Welch*, 755 S.W.2d 624, 632 (Mo. Ct. App. 1988).

168. See *State v. Damask*, 936 S.W.2d 565, 575 (Mo. 1996) (en banc).

169. *State v. Canton*, 775 S.W.2d 352, 354 (Mo. Ct. App. 1989).

170. *Biggerstaff*, 496 S.W.3d at 515–16.

171. See *id.*

172. *Id.* at 516.

173. See *State v. Welch*, 755 S.W.2d 624, 625 (Mo. Ct. App. 1988).

174. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

175. *Id.* at 42. The term "roadblock" here is used interchangeably with "checkpoint."

176. *Id.* at 41.



deaths caused by unqualified or unsafe drivers and defective equipment on motor vehicles.”<sup>177</sup>

Not only was this purpose facially general, it exceeded the general interest of crime control. The population of “unqualified or unsafe drivers” could encompass nearly everyone, depending on where the line is drawn. While driving with defective equipment is a criminal violation, being merely an “unsafe” driver is generally not. Driving with music blaring is potentially “unsafe,”<sup>178</sup> but it is not unlawful or criminal. The court offered no guidance regarding how to define these terms and was apparently content with a checkpoint that was originated to detect “unsafe” drivers.<sup>179</sup> The *Biggerstaff* checkpoint’s stated purpose was even more general than that of the unconstitutional checkpoint in *Edmond*, which at least targeted a type of criminal wrongdoing.<sup>180</sup>

Second, these broad enforcement checkpoints are easier to set up in Missouri than checkpoints with specific purposes, such as sobriety checkpoints.<sup>181</sup> Enforcement checkpoints may be approved by a zone supervisor or assistant zone supervisor on site and require no further approval from Troop Headquarters.<sup>182</sup> In contrast, sobriety checkpoints are governed by a separate order from enforcement checkpoints and require authorization from Troop Headquarters before being conducted.<sup>183</sup> This produces an incentive for law enforcement to set up general purpose enforcement checkpoints instead of specifically tailored sobriety checkpoints. As *Biggerstaff* demonstrates, officers at enforcement checkpoints are still capable of making drunk driving arrests,<sup>184</sup> and they do not have to jump through extra hoops to create sobriety checkpoints, which achieve the same ends. This practice sharply contrasts with the *Edmond* decision that warned of the potential dangers of allowing law enforcement to spontaneously set up checkpoints.<sup>185</sup>

### E. Back to Basics

Each of the issues discussed are problematic on their own; when aggregated, a new singular concern arises with the *Biggerstaff* decision. *Biggerstaff* reverts to pre-*Prouse* territory when roving suspicionless stops were not constitutionally constrained. *Biggerstaff* has upheld enforcement checkpoints with

177. Record on Appeal – Transcript, *supra* note 14, at 33.

178. See Warren Brodsky & Zack Slor, *Background Music as a Risk Factor for Distraction Among Young-Novice Drivers*, 59 ACCIDENT ANALYSIS & PREVENTION 382 (2013).

179. State v. Biggerstaff, 496 S.W.3d 513, 515–16 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016).

180. *Edmond*, 531 U.S. at 41.

181. Record on Appeal – Transcript, *supra* note 14, at 40.

182. *Id.* at 11–12.

183. *Id.* at 40.

184. *Id.* at 9; *Biggerstaff*, 496 S.W.3d at 513.

185. *Edmond*, 531 U.S. at 42.

general purposes.<sup>186</sup> These checkpoints can be set up on site by anyone with a sufficient rank and without approval from Troop Headquarters.<sup>187</sup> A lack of meaningful notice combined with a court's complete deference, or even indifference, to a checkpoint's location opens the door for these checkpoints to be set up at anytime, anywhere.

A bit of creativity would transform *Biggerstaff* into a powerful law enforcement tool for effectuating seizures without the requisite individualized suspicion. Police could essentially target a vehicle, or person therein, and place a checkpoint on its predicted path. The stated purpose of the stop would be to conduct a standard enforcement checkpoint, but in reality it would only be a pretext<sup>188</sup> for further investigation. This practice is not quite the same as the roving stops that *Prouse* discontinued because the officers would be operating from static checkpoints instead of moving patrol vehicles, but it is only one step removed. In stark contrast to established precedent, the location of the checkpoint and the individual to be stopped are left to the unbridled discretion of the officers at the scene.<sup>189</sup> This is antithetical to the notion that constitutional checkpoints are those crafted precisely to minimize "standardless and unconstrained discretion."<sup>190</sup>

Unconstrained discretion allows certain biases, whether deliberate or implicit, to surface. For example, research suggests that African-Americans are disproportionately stopped by police compared to Caucasians.<sup>191</sup> While racial profiling by law enforcement is technically unlawful, evidence resulting from an otherwise reasonable seizure is not deemed inadmissible simply because of perceived racial profiling.<sup>192</sup> The subjective motives of police are irrelevant when considering the reasonableness of the seizure.<sup>193</sup> All that matters is that

186. See *Biggerstaff*, 496 S.W.3d at 516.

187. Record on Appeal – Transcript, *supra* note 14, at 40.

188. *Whren v. United States*, 517 U.S. 806, 812–13 (1996). Police stops are labeled as "pretext" stops when their given reason does not align with the subjective motives of the officer. *Id.* For example, an officer may pull a motorist over for speeding because the officer suspects the motorist is a drug courier. The traffic stop for speeding was only a pretext so that the officer can further investigate his or her suspicions. These types of stops are lawful because the subjective thoughts of a police officer have no bearing on whether a law enforcement practice is objectively reasonable. *Id.*

189. See *Biggerstaff*, 496 S.W.3d at 515–16.

190. *Edmond*, 531 U.S. at 39 (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)).

191. See, e.g., Steven Hayle et al., *Race, Street Life, and Policing: Implications for Racial Profiling*, 58 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 322, 337–38 (2016); Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N. 813, 814 (2007).

192. Lewis R. Katz, *Whren at Twenty: Systemic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923, 928 (2016).

193. *Id.*

the requisite reasonable suspicion be met prior to the effectuation of the seizure.<sup>194</sup>

Profiling also occurs in other forms.<sup>195</sup> Profiling of out-of-state drivers is a growing concern now that there are inconsistent marijuana laws across the country.<sup>196</sup> A recent Tenth Circuit decision ruled that reasonable suspicion does not arise simply because a driver is a resident of a state that has legalized recreational marijuana, and it further decries targeting drivers because of their out-of-state license plates.<sup>197</sup> However, *Biggerstaff*-approved checkpoints can be used to effectuate pretext stops that perpetuate racial biases, while allowing police to circumvent prohibitions against residency and license plate profiling.<sup>198</sup>

The checkpoint in *Welch* was upheld because all of the factors that were considered met the bar for reasonableness.<sup>199</sup> *Welch* is today's gold standard for Missouri checkpoints because it shows exactly how a proper checkpoint should operate.<sup>200</sup> Holding each factor of a checkpoint to a high standard helps the overall goal of minimizing police discretion and Fourth Amendment violations.<sup>201</sup> *Biggerstaff* diminished the importance of these factors, which in turn granted officers the exercise of greater discretion at the expense of individual privacy interests.

## VI. CONCLUSION

The *Biggerstaff* decision significantly relaxed the standard normally applied to checkpoints. *Edmond* provided a straightforward outline of how a constitutional checkpoint should look,<sup>202</sup> and *Welch* demonstrated how a constitutional checkpoint operated in practice.<sup>203</sup> The checkpoint in *Biggerstaff* did not resemble either of these examples in that it altered the traditionally used balancing test, abrogated the notice factor, weakened the need to logically select a checkpoint location, had a generally stated purpose, and permitted unbridled police discretion.<sup>204</sup>

*State v. Biggerstaff* has implications for motorists in Missouri. This type of checkpoint is now the checkpoint law in Missouri, despite falling short of

194. *Id.*

195. See Hayle et al., *supra* note 191, at 337–38.

196. See, e.g., COLO. CONST. art. XVIII, § 16; Adult and Medical Use of Cannabis Act, OR. REV. STAT. ANN. §§ 475B.010–475B.395 (West 2017).

197. Vasquez v. Lewis, 834 F.3d 1132, 1137–38 (10th Cir. 2016).

198. See *State v. Biggerstaff*, 496 S.W.3d 513, 515–16 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016).

199. *State v. Welch*, 755 S.W.2d 624, 631–32 (Mo. Ct. App. 1988).

200. *Id.* at 625, 631–32.

201. *Id.* at 627.

202. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40–42 (2000).

203. *Welch*, 755 S.W.2d at 625, 631–32.

204. See *State v. Biggerstaff*, 496 S.W.3d 513, 513–16 (Mo. Ct. App.), *transfer denied* (Mo. June 28, 2016).

standards set in *Welch*.<sup>205</sup> This decision narrowed the scope of reasonableness, but it did not explicitly say what is unreasonable.<sup>206</sup> This decision opened the door for police to conduct checkpoints wherever and whenever they want – so long as basic guidelines are followed.<sup>207</sup> The Supreme Court of Missouri recently declined to review *Biggerstaff*, meaning that as of the time of this Note, it is binding law across Missouri with no foreseeable chance of being overturned.<sup>208</sup> *Biggerstaff* reduced the number of reasonableness factors that must be present for a checkpoint to be constitutional and gutted the present factors of much of their protective bite, making police stops easier to effectuate and subject to less scrutiny.<sup>209</sup>

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205. *Id.* at 516.

206. *Id.* at 515–16.

207. *Id.*

208. *Id.* at 513–16.

209. *Id.* at 515–16.

